(3) No. 10-795

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In The
Supreme Court of the United States

GREEN PARTY OF CONNECTICUT, ET AL.,

Petitioners,

v.

ALBERT P. LENGE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

There is no dispute that states are permitted to require a showing of a significant level of public support for a party or a candidate before awarding public funding. *Buckley v. Valeo*, 424 U.S. 1, 96 (1976). This showing of support protects the public from funding hopeless, fly-by-night candidates, prevents the artificial splintering of political parties and prevents unrestrained factionalism. *Id.* Petitioners ask this Court to establish a uniform constitutional rule applicable to all states and localities that may enact public financing programs requiring them to treat minor party and independent candidates on identical terms with major party candidates in the awarding of public funding. *Buckley* rejected this exact argument. Rather, the rule announced in *Buckley* is that a legislature may properly condition the awarding of funds in a public financing program on a candidate's or party's preliminary showing of significant public support, *id.* at 96, and that the obvious differences in kind between major party and minor party candidates need not be ignored by the legislature when crafting a public financing program. *Id.* at 97-98. The only constitutional constraint on a legislature when advancing its significant governmental interests of protecting the public fisc and avoiding artificial splintering and unrestrained factionalism is the need to avoid unnecessary and unfair burdens on the

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW—Continued

political opportunity of any party or candidate. *Id.* at 94, and petitioners failed to demonstrate such a burden.

Thus, the issue properly presented in this case is whether the Court of Appeals correctly applied the settled rule of *Buckley* to Connecticut's unique public financing system, and to the facts of the petitioners' claims particularly, which the Court of Appeals determined to be insufficiently developed.

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COUNTER-STATEMENT OF THE CASE

This petition arises out of a challenge to the constitutionality of Connecticut's Citizens' Election Program ("CEP") brought by two minor parties and a minor party candidate. The CEP was enacted by the Connecticut General Assembly in 2005 as part of the Comprehensive Campaign Finance Reform Act ("CFRA"), Public Act 05-5 (October 2005 Spec. Sess.). The Second Circuit Court of Appeals rejected petitioners' challenge to the CEP's eligibility criteria for minor party and petitioning candidates because it found petitioners had failed to establish evidence of harm or discrimination against minor parties or their candidates attributable to the operation of the CEP. The features of CEP, and its relation to Connecticut's overall electoral scheme, which favors nascent minor party candidates in ways that far exceed constitutional requirements, necessarily confine any decision by this Court regarding the CEP to unique facts of Connecticut's program. The Court of Appeals applied the proper legal standard from *Buckley v. Valeo*, 424 U.S. 1 (1976) to the facts in the record, and the lack thereof, and the decision below does not conflict with any decision by another Court of Appeals. In applying *Buckley*'s principles, the Court of Appeals correctly concluded that on the record on appeal petitioners had not met their burden to establish cognizable harm to their rights protected under the First Amendment or Fourteenth Amendment. It properly declined to accept petitioners' arguments of speculative future harm to

minor parties arising out of the operation of the CEP and noted the inconclusive nature of the predictions made by petitioners regarding future harm. The Court of Appeals reasonably held that the record from the one election cycle in which the CEP operated, 2008, foretold a possible "boon" for minor party candidates and not necessarily a "burden" because minor party candidates qualified for CEP funding in 2008 and obtained vote totals that established minor party eligibility for full or partial CEP grants in 2010. Moreover, the CEP grants awarded minor party and petitioning candidates in 2008 far exceeded the amounts of private fundraising historically attained by minor party and unaffiliated candidates thereby resulting in more, not less, minor party speech and political opportunity. The Court of Appeals found petitioners' conjecture regarding harm, which *Buckley* instructs cannot be a basis for invalidating a public financing program, not only inappropriate but inconclusive because the results from the one election cycle provided early indications that the CEP actually enhanced the political opportunity of minor party candidates in Connecticut. The Court of Appeals cautioned that although another case and a future record may demonstrate a constitutionally cognizable harm to minor party candidates, the record below did not and, therefore, invalidation of the CEP was improper under *Buckley*. For these reasons, as set forth more fully below, this Court should deny petitioners' petition.

I. CONNECTICUT'S CITIZENS' ELECTION PROGRAM

In 2005, Connecticut enacted the CFRA, in response to a series of highly publicized and debilitating political scandals that resulted in the criminal prosecution of several prominent political figures—most notably the conviction and imprisonment of Governor John Rowland. The CFRA was enacted to combat political corruption that had taken root and flourished in the highest levels of government in Connecticut and to restore public confidence in the integrity of government and the democratic process. Petitioners' Appendix ("Pet. App.") 86a-87a, 183a-188a.

Following the resignation and conviction of Governor Rowland, Governor M. Jodi Rell and legislative leaders embarked on an eighteen month process of deliberating and negotiating various reform proposals. After differing factions failed to reach a compromise during the 2005 regular legislative session, Governor Rell convened a special reform working group to continue public discussion and deliberation of reform proposals after the formal adjournment of the General Assembly. The Campaign Finance Reform Working Group reported its findings and proposals to the Governor in September 2005; and in October 2005, Governor Rell convened a Special Session of the General Assembly for the sole purpose of enacting election reform. After caucusing for over a month in Special Session, the General

Assembly enacted the CFRA on December 1, 2005 and Governor Rell signed it into law six days later.

A central feature of the legislative compromise that led to the enactment of the CFRA was the CEP, a voluntary system of public campaign financing for candidates for statewide and legislative offices. *All candidates* for statewide or legislative office in Connecticut have an opportunity to participate in the CEP, irrespective of their political affiliation or prior involvement in electoral politics. All candidates wishing to participate in the CEP must first demonstrate a certain threshold level of public support for their candidacy before receiving CEP funds, and can make this showing of public support through alternative eligibility criteria.

II. OPERATION OF THE CEP

A. Eligibility Criteria

Candidates become eligible for CEP funding in the general election in any of three ways. First, they may win the nomination of a major party, defined as a party whose candidate in the last gubernatorial election received at least 20% of the vote or as a party with at least 20% of party-enrolled voters in the state. Conn. Gen. Stat. § 9-372(5); § 9-702(a). Second, they may win the nomination of a political party that has attained minor party status for the relevant office and whose candidate in the previous election for that office garnered at least 10% of the total vote. Conn. Gen. Stat. § 9-705(c)(1) and (g)(1). Third, if unable to

satisfy either of the first two methods of qualifying, candidates may also demonstrate sufficient public support by submitting nominating petition signatures in a number equal to at least 10% of the total votes cast in the last election for the relevant office. *Id.* §§ 9-705(c)(2) and (g)(2). Candidates have over seven months to gather the petition signatures required to obtain the 1% for ballot access or the 10% required for CEP eligibility. See Conn. Gen. Stat. § 9-453b (authorizing issuance of nominating petitions on the first business day of the election year); see also Conn. Gen. Stat. § 9-453i (requiring submission of petition signatures no later than the 90th day before the November general election).

In addition, all candidates must gather qualifying contributions, in increments of no more than $100 per individual, in total amounts varying by the level of office sought to become eligible for CEP funds. Conn. Gen. Stat. §§ 9-704(a)-(e). All candidates are required to gather the same number and amount of qualifying contributions for each respective office. *Id.* A candidate for governor must gather $250,000 in qualifying contributions, $225,000 of which must come from residents of the state, *id.* § 9-704(a)(1); a candidate for other statewide offices must gather $75,000 in qualifying contributions, $67,500 of which must come from residents, *id.* § 9-704(a)(2); a candidate for state senate must gather $15,000 in qualifying contributions, including contributions from 300 residents of a municipality located at least in part in the district the candidate seeks to represent,

id. § 9-704(a)(3); a candidate for state representative must gather $5,000 in qualifying contributions, including 150 from local residents, *id.* § 9-704(a)(4). Candidates may begin collecting the required qualifying contributions *at any time*. *Id.* § 9-702(c); §§ 9-704(a)-(e).

B. Distribution Formulae

All candidates, irrespective of party affiliation, who meet the relevant eligibility and qualifying contributions criteria and qualify for the ballot may receive a grant for the general election. In the 2008 election cycle, the full general-election grant amounts were: for governor, $3 million;[1] for attorney general, state comptroller, secretary of the state, and state treasurer, $750,000; for state senator, $85,000; and for state representative, $25,000. See Conn. Gen. Stat. §§ 9-705(a)-(f). Pet. App. 92a. General election grants may, however, be reduced for candidates running in uncontested elections. Conn. Gen. Stat. §§ 9-705(j)(3)-(4).

Thus, participating major party candidates are eligible to receive full grants when they face a major party opponent or a non-major party opponent who qualifies for CEP funding. Conn. Gen. Stat. §§ 9-705(a)-(f); *id.* § 9-705(j). A participating major

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[1] The grant amount for participating candidates for governor was increased from $3 million to $6 million in 2010. Public Act 10-1, § 3 (July 2010 Spec. Sess.).

party candidate who is unopposed in the general election receives only a 30% grant. *Id.* § 9-705(j)(3). A participating major party candidate facing only non-major party opposition will receive a reduced 60% grant amount provided that the non-major party opponent has not raised the qualifying contributions amount for the relevant office. *Id.* § 9-705(j)(4).

Candidates who have not won the nomination of a major party may become eligible to receive either a full general election grant, or a two-thirds or one-third general-election grant either by demonstrating they are the nominee of a minor party whose candidate in the previous election for the relevant office received at least 20%, 15%, or 10% of the total vote, or by submitting a number of petition signatures equal to at least 20%, 15%, or 10% of the prior vote for the relevant office. Conn. Gen. Stat. §§ 9-705(c)(1)-(2) and (g)(1)-(2). Qualifying minor party or independent candidates who receive less than a full general election grant may raise private funds up to the amount of the full grant for the relevant office. *Id.* § 9-702(c). The participating non-major party candidates, who receive less than a full general election grant, also may become eligible to receive post-election funding to cover deficits, if they receive a percentage of the vote that exceeds the percentage of their grant amount. *Id.* §§ 9-705(c)(3) and (g)(3).

C. Primary Election Funding

Major parties are statutorily required to hold primary elections under certain mandatory procedures and a major party candidate may only participate in a primary after demonstrating a certain level of public support. Conn. Gen. Stat. § 9-400, § 9-415. Major party candidates participating in a primary election may become eligible for CEP funding for their primary. See *id.* § 9-702(a), §§ 9-705(a)(1), (b)(1), (e)(1), (f)(1), § 9-415. All primary grant funds that are either unspent or were expended for general election purposes during the primary are deducted from an eligible candidate's general-election grant. *Id.* § 9-705(j)(2).

In contrast, minor parties are not required by statute to select their candidates through primary elections and historically have not done so. Conn. Gen. Stat. § 9-702(a), § 9-451, § 9-452; see also Pet. App. 92a. While minor parties are not statutorily prohibited from selecting their candidates through primary elections, no minor party currently provides for the nomination of its candidates through a primary in its bylaws. Pet. App. 92a. A minor party that chose to nominate its candidates through a primary, as opposed to a nominating convention, could qualify for a primary grant under the CEP. Pet. App. 92a.

III. THE PROCEEDINGS BELOW

Petitioners brought a five count complaint challenging various provisions of the CFRA. In Count I, the only count relevant to this petition,[2] petitioners alleged the CEP's eligibility requirements and grant distribution formulae violate the rights of minor parties and minor party candidates protected under the First Amendment and Fourteenth Amendment to the United States Constitution. U.S. Const. Amend. I (free speech clause), Amend. XIV (equal protection clause).

The district court ruled in favor of petitioners on Count I and, on appeal, the Second Circuit Court of Appeals reversed the district court's ruling. The Second Circuit applied the legal standards set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976) and concluded that on the record before it, comprised of data from only the 2008 elections, the first election cycle in which the CEP operated, petitioners had not met their burden under *Buckley* to demonstrate discriminatory "practical effects" attributable to the CEP that could be said to unfairly or unnecessarily

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[2] The Connecticut General Assembly subsequently repealed the provisions challenged in Counts II and III. See Conn. Gen. Stat. § 9-713 and § 9-714; Public Act 10-1, § 15 (July 2010 Spec. Sess.). The General Assembly amended the provisions challenged in Count IV, Public Act 10-1, §§ 9-10 (July 2010 Spec. Sess.), and petitioners abandoned Count V in their appeal. Pet. App. 98a.

burden petitioners' or any other party's continued availability of political opportunity.

The Court of Appeals carefully observed *Buckley*'s guiding principles applicable to public financing programs generally: that public financing programs expand First Amendment values, *Buckley*, 424 U.S. at 92-93, and are "not restrictive of voters' rights and less restrictive of candidates' [rights]" and therefore do not impose a "direct" burden on First Amendment rights. *Id.* at 94; Pet. App. 107a-108a.

The Court of Appeals also determined that *Buckley* does not require that public financing programs be subject to "exacting scrutiny." Rather, *Buckley* distinguished between public financing programs and "direct burdens" on speech, such as ballot access restrictions that are subject to "exacting scrutiny." While *Buckley* instructs that the CEP need not be subjected to "exacting scrutiny," the Court of Appeals nonetheless analyzed the program under that standard—requiring a "substantial relationship" between the CEP and a "sufficiently important governmental interest"—and found it constitutional, thereby obviating the need for further consideration under a lesser standard. Pet. App. 111a.

REASONS FOR DENYING THE WRIT

There are no compelling reasons to grant certiorari in this case. First, there is no circuit split on the question of whether states may enact public

financing programs that treat minor party and petitioning candidates differently in regard to eligibility criteria to ensure those candidates demonstrate a threshold level of public support. Petitioners attempt to fashion a circuit split from the thin cloth of a thirty-three year old district court decision, *Bang v. Chase*, 442 F. Supp. 758 (D. Minn. 1977), *summarily aff'd sub nom., Bang v. Noreen*, 436 U.S. 941 (1978). Petitioners' reliance on *Bang* demonstrates two critical points: the relative infrequency with which public financing programs are enacted and challenged and the difficulty of making meaningful comparisons between public financing programs, because each program is invariably only one component of a unique electoral scheme. Indeed, *Bang* is easily distinguishable from the facts of this case because the program there operated differently and was part of an overall electoral scheme that treated minor parties differently than Connecticut does.

Petitioners have also failed to proffer any issue of national importance that could justify review by this Court on this meager record. The CEP is not only unique to Connecticut, but is only one of three statewide public campaign financing programs operating nationwide. Moreover, petitioners have not established that states across the nation, all of which are laboring under unprecedented budget constraints, are poised to adopt, or even consider adopting, public financing programs at this time. This case presents questions that are confined to the unique

circumstances existing in Connecticut and a decision by this Court will be unlikely to have any far reaching or discernible impact nationwide.

Finally, petitioners acknowledge the Court of Appeals used the correct legal standard under *Buckley* in its decision, and merely object to the application of that standard to the facts in this case. Such a complaint is not a proper basis upon which the petition may be granted. See S. Ct. Rule 10.

Even if it were a proper ground upon which to grant a writ of certiorari, petitioners' claim of misapplication of the law to the facts has no merit. Petitioners fundamentally misunderstand their evidentiary burden under *Buckley* to produce and prove facts that demonstrate an unfair or unnecessary burden to their "political opportunity" that results in a reduction in their strength. Under *Buckley*, petitioners were required to demonstrate that the CEP reduced or diminished their strength below levels attained prior to the enactment of the CEP. In the absence of concrete evidence, petitioners have relied upon speculative and disjointed claims of future harms caused by the singular or combined operation of various provisions of the CEP. All of the claims on petitioners' "laundry list" of future harms are derivative; as each is premised on an award of a benefit to others that is denied to them.

What this petition lacks, and what the Court of Appeals appropriately found fatal to petitioners' claims in Count I, are concrete and measurable

"practical effects" of actual harm to minor party candidates fairly attributable to the CEP. Petitioners could not demonstrate any diminution of their already somewhat minimal strength that could be causally linked to the enactment of the CEP in 2008. While petitioners' claim that the Court of Appeals misapplied *Buckley* to the facts of their case, it was the absence of a factual record of harm the Court of Appeals found problematic. Indeed, the Court of Appeals candidly acknowledged that it was initially receptive to petitioners' allegations of harm arising from the CEP's eligibility criteria and that its "intuition" at the outset had been that petitioners could make a showing of unconstitutional burden. A review of the record below altered this impression and the Court of Appeals properly declined to strike down landmark reform legislation on the basis of its "intuition" or petitioners' speculative claims of harm. Pet. App. 124a.

Instead, the court below undertook a careful and faithful application of the legal standard derived from *Buckley* applicable to public financing. Moreover, its decision is also in accord with this Court's decisions disfavoring facial challenges of election statutes. See *Washington State Grange v. Washington Republican Party*, 552 U.S. 442, 450 (2008) (eschewing "premature interpretations of [election] statutes in areas where their constitutional application might be cloudy"); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 200 (2008) (parties seeking to

"invalidate [an election] statute in all its applications, [. . .] bear a heavy burden of persuasion.").

Not only have petitioners failed to demonstrate the Court of Appeals applied an incorrect legal standard or misapplied the correct standard, they also cannot establish any of the other bases for granting a petition such as a need for this Court to resolve a conflict among lower courts or a national need for the court to address the issue.

I. THERE IS NO CIRCUIT SPLIT

Petitioners do not argue that there is a split among the circuit courts of appeals regarding the issue in this case because there is *none*. Indeed, due to the uniqueness of the CEP—among just three operative statewide public financing programs that exist today—no other circuit court has even applied *Buckley* to a public financing system.

Out of necessity, petitioners resort to constructing a "conflict" from a thirty-three year old district court decision in *Bang v. Chase*, 442 Supp. 758 (D. Minn. 1977), *summarily aff'd sub nom., Bang v. Noreen*, 436 U.S. 941 (1978).[3] Even if such a conflict were sufficient to warrant this Court's review—which it

[3] The Court of Appeals properly concluded that such a summary affirmance was of little precedential value beyond that case and should not be construed as an endorsement of the lower court's reasoning. Pet. App. 103a, citing, *Bush v. Vera*, 517 U.S. 952, 966 (1996) (Kennedy, J., concurring).

clearly is not under this Court's precedent—*Bang* can be distinguished from this case with ease and therefore presents no conflict at all.[4]

Specifically, petitioners' reliance on the conclusion in *Bang* that the use of a statewide proxy impermissibly discriminates against minor party candidates is inapt. The *Bang* Court found objectionable the automatic awards of public funds to primary winners in legislative districts based *exclusively* on a statewide formula, without any requirement that the candidate show a level of support in his or her particular district. *Bang*, 442 F. Supp. at 767-768.

The CEP operates completely differently because it applies to statewide races where the use of a statewide proxy is clearly appropriate, and it requires legislative candidates to demonstrate local support for their campaigns by gathering qualifying contributions. The CEP does *not* award funds to legislative or statewide candidates, based *solely on* a statewide proxy. Rather, legislative candidates wishing to receive a CEP grant must establish localized support *both* by garnering a major party nomination *and* by gathering the necessary qualifying contributions from residents *in their own districts*.

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[4] The Court of Appeals observed that the CEP is substantially different from the program that was under review in *Bang* and noted the CEP appeared to be "far more generous to minor party candidates." Pet. App. 104a, n. 4.

This showing of local support required in the CEP is precisely the element the court found lacking in *Bang*. Consequently, the Court of Appeals' decision and *Bang* are not in conflict and, even if they were, a single district court decision from more than thirty years ago would not provide a sufficient conflict at this point to justify granting the petition.

II. THE ISSUES PRESENTED IN THE PETITION ARE UNIQUE TO THE CEP, AND ANY DECISION BY THIS COURT WILL HAVE NO FAR REACHING OR EVEN DISCERNIBLE IMPACT NATIONWIDE

Petitioners contend incorrectly that this case raises issues of national importance, but fail to articulate coherently how a decision of this Court construing the unique features of Connecticut's electoral program, on a skeletal record, will have a far reaching impact or provide guidance to other states on the question of constitutional tolerances for public financing programs. Petitioners also fail to make a compelling case for the purported need for "uniformity" of qualifying criteria in public financing programs. Not unlike petitioners' claims in their case in chief, this claimed need for national uniformity is founded on speculation and conjecture because petitioners do not adequately demonstrate that other states are poised to enact public financing programs. Petitioners correctly acknowledge in their petition that the CEP is distinctly unique among the state public financing programs that have been adopted

thus far. Petition ("Pet.") 26. From a practical perspective, therefore, any decision by this Court necessarily will be limited to Connecticut and the specific requirements of the CEP.

More fundamentally, however, petitioners' flawed rationale as to why this Court's intervention is necessary actually counsels *against* granting the petition. Petitioners essentially claim that, because the CEP goes further in some respects than other public financing programs that exist today, this Court's intervention is immediately necessary in order to impose "uniformity" in this developing area of electoral reform. This is precisely what this Court should *not* do.

States have been described as the great "laboratories" of our federal system and must be free to experiment by enacting legislation aimed at improving the lives of their citizens without risking or binding other states and their citizens. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This certainly is true in the area of public campaign financing, in which each state must balance several widely divergent, and often competing, interests in order to develop a program that fits its own specific needs and limitations. *Buckley*, 424 U.S. at 103. In light of the inherent complexities that any electoral reform of such magnitude entails, states must be given the time and opportunity to develop programs that satisfy all parties involved and at the same time fit within constitutional boundaries. Because of the

small number of states that have adopted full public financing programs thus far, however, there simply is not yet a sufficient body of experience—either practical or legal—from which to determine the range of programs that satisfy both of these criteria. It would therefore be premature for this Court to step in and impose a "uniform" rule that draws a permanent line between those programs that impermissibly burden minor parties' political opportunity and those that do not. Indeed, this case is a particularly inappropriate vehicle by which to undertake such a task given that the true impact of the CEP itself is, at this early juncture, still largely unknown and speculative.[5] In fact, it is possible—and, to many observers, probable—that the CEP will be a "boon," (Pet. App. 135a), to minor parties, who, unlike the petitioners here, choose to organize themselves and put effort into qualifying for public financing.

In addition, petitioners' facile comparisons to programs in Maine and Arizona, as well as the presidential public financing system at issue in *Buckley*, in support of their call for uniformity are incomplete and therefore should be accorded no weight. Petitioners allude to the purported party

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[5] Moreover, the "immediacy" with which petitioners claim that uniformity is needed is by no means clear. There is no indication that any other state intends to adopt a program like the CEP in the near future, much less the proverbial flood of states that petitioners claim are sure to follow Connecticut's lead.

neutrality of the systems operated by Maine and Arizona but fail to elucidate whether those states achieve their important governmental interests of protecting the public fisc and avoiding artificial splintering and unrestrained factionalism in their public financing systems by erecting barriers to the presence of minor parties on their ballot in the first instance. For example, petitioners fail to clarify whether Maine and Arizona allow any party or candidate to get on the ballot by gathering petitions equal to 1% of the prior vote total for that election, or whether those states allow minor parties to maintain their minor party ballot position for the next election upon a mere 1% vote showing *for that office* without requiring a demonstration of broader statewide support; or whether the comparator states foster the growth and public support for minor parties by permitting fusion voting or cross endorsements of major party candidates. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362-363 (1997). (upholding Minnesota's ban on fusion voting and cross endorsements by minor parties).

Petitioners also neglect to acknowledge the serious obstacles to minor party participation present in the presidential system considered in *Buckley*, such as: the categorical shut-out of minor party candidates in the first year they run a presidential candidate, *Buckley*, 424 U.S. at 88; the categorical unavailability of full funding for minor party candidates, *id.* at 88; the complete exclusion of independent candidates. *Id.* at 87, n. 118; and the

absence of a petitioning alternative. *Id.* at 100. Upon closer scrutiny petitioners' claim of the need for and desirability of uniformity among public financing systems based on these comparisons appears not only illusory but ill-advised. Indeed, other minor parties might object to the uniformity these petitioners seek to impose.

This case therefore does not present any issues of national significance that require this Court's resolution at this time. Given the lack of experience with public campaign finance programs nationwide—and with the operation of the CEP in particular—this Court should reject petitioners' premature request to impose "uniformity" in this still developing area of the law.

III. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD FROM *BUCKLEY* AND APPLIED IT CORRECTLY TO AN INSUFFICIENT RECORD

Petitioners do not dispute that the Court of Appeals correctly applied the legal standard from *Buckley* but simply disagree with the outcome derived from the application of the standard to the facts of this case. Petitioners' claim of error arising from a misapplication of the correct legal standard to a set of facts is not a proper ground to grant their petition. See S. Ct. Rule 10 (misapplication of properly stated rule of law not valid basis for granting petition).

Assuming *arguendo*, that petitioners' disagreement with the Court of Appeals' application of the correct legal standard from *Buckley* could provide an appropriate basis for granting their petition, however, the Court of Appeals did not misapply *Buckley* in this case. Rather, the court below scrupulously followed the language of *Buckley* and applied four recognizable principles from *Buckley* in determining whether the CEP unfairly or unnecessarily burdened the political opportunity of minor parties or minor party candidates: (1) states can establish thresholds that require a showing of significant public support before providing public funds; (2) legislative decisions regarding the required public support are entitled to deference; (3) a plaintiff bears the burden of establishing that the program operates to reduce its strength to a level below that attained without the program; and (4) a court should not engage in speculation and should require a plaintiff to adduce tangible evidence of practical effects about the operation of the program. Pet. App. 122a.

First Principle: States Can Establish Thresholds That Require A Showing Of Significant Public Support Before Providing Public Funds.

Neither *Buckley* nor any other decision of this Court has held that a state must treat minor parties and minor party candidates as if they were major party candidates for purposes of awarding public money in order to be constitutional under *Buckley*. Rather, states may, consistent with the First and

Fourteenth Amendments, require that nascent parties and unaffiliated candidates make a showing of significant public support before dispensing public funds to them. In *Buckley*, this Court validated the legitimacy of the legislature's recognition of the "obvious difference in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other." *Buckley*, 424 U.S. at 97, quoting *Jenness v. Fortson*, 403 U.S. 431, 441 (1971). Neither *Buckley* nor any other decision of this Court require legislative blindness to the obvious multiple differences between major and minor party candidates. To the contrary, *Buckley* stated that "[t]he Constitution does not require [the legislature] to treat all declared candidates the same for public financing purposes." *Buckley*, 424 U.S. at 97. Thus, states may condition an award of public funding on "some preliminary showing of a significant modicum of support." *Id.* at 96, quoting *Jenness*, 403 U.S. at 442. In fact, *Buckley* specifically noted that "[t]hird parties have been completely incapable of matching the major parties' ability to raise money and win elections," and therefore expressly approved of legislatures treating minor party candidates differently, stating that they are "justified in providing both major parties full funding and all other parties only a percentage of the major-party entitlement." *Id.* at 98.

The Court of Appeals in this case recognized that a state may require a demonstration of significant

public support established in *Buckley* and found the CEP's eligibility criteria for minor party candidates based upon prior vote totals was reasonable and consistent with *Buckley*. The Court of Appeals properly rejected petitioners' claim that the CEP's requirement of threshold demonstration of public support of at least 10% in a prior election before awarding public funds discriminates against minor parties by making it "difficult" and "nearly impossible" for them to qualify for CEP funds. Pet. 10; Pet. App. 128a, n. 14. The Court of Appeals rejected this claim of "near impossibility" because the facts contradicted it: viable minor party candidates were automatically eligible for CEP grants in 2008 and 2010 after only one election cycle under the new program. In fact, the 2008 elections demonstrated that, if anything, minor party candidates generally fared *better* under the CEP than they had in the preceding election cycle, although one of the named plaintiffs may have performed worse in 2008.

Second Principle: Legislative Decisions Regarding The Level Of Required Public Support Are Entitled To Deference.

The Court of Appeals properly deferred to the General Assembly's decisions regarding the appropriate levels of public support required before dispensing public funds to candidates. The legislature reasonably used a longstanding statewide 20% prior vote requirement as a benchmark for any party's candidates to be eligible for a full CEP grant. Major

party candidates must, by definition, belong to a political party that yielded 20% of the vote in the last gubernatorial election or had, at the last gubernatorial election, a number of enrolled members equal to the 20% of the total number of enrolled members of all parties in the state. Conn. Gen. Stat. § 9-372(5). In contrast, a minor party candidate is a candidate that belongs to a party that yielded 1% of the vote in the last election for the office for which the candidate is running. Conn. Gen. Stat. § 9-372(6). *All* candidates must collect the appropriate number of qualifying contributions in order to be awarded a grant. Again, the Court of Appeals found petitioners' claims of burden on their political opportunity by the application of the 20% proxy belied by the facts in the record. Minor party candidates—many of whom ran in so-called "safe" districts, which petitioners claim to be a particular locus of their alleged harm—in fact fared better in 2008 under the CEP.

Even if the evidence supported a conclusion that minor party candidates performed worse in "safe" districts under the CEP or faced stiffer competition than they did before enactment of the CEP—which it does not—these facts alone would not render the CEP an unfair or unnecessary burden on petitioners. Petitioners' claim of a special entitlement under *Buckley* to maintenance of the *status quo ante* in "safe" districts is a misreading of *Buckley*. Even if legislative enactments could ensure the preservation of the status quo in the few districts where petitioners lay claim to prior success, this result is

neither required under *Buckley* nor desirable. Enhancement of democratic value through greater competition and voter choice in "safe" districts furthers the fluidity of our political system, a value recognized in *Buckley* and *Williams v. Rhodes,* 393 U.S. 23 (1968). Indeed, the Court of Appeals observed that increased competition among major party candidates could inure to the benefit of minor party candidates because of the dynamic and fluid nature of our political system. Pet. App. 133a.

The Court of Appeals also found legislative decisions regarding the distribution formulae entitled to deference because, although the legislature "painted with a broad brush," (Pet. App. 141a), when it pegged the CEP grant amount formulae for legislative districts to the historically most competitive districts, it did so for easily justifiable reasons. The alternative of capping grant amounts at recent historic spending in a particular district was fraught with peril because it might not account for new factors that could unexpectedly enhance competition in the district on short notice, such as an open seat or other political changes. The legislature's decisions about the appropriate grant amounts required to ensure participating candidates had sufficient resources to spread their message and respond to competitors and the amounts required to encourage participation in the CEP were entitled to deference.

The court below emphasized that, although the grant levels are somewhat higher than the amounts historically raised in many "safe" districts, this does

not indicate that candidates *could not* have raised such funds if they had sought to. The court also acknowledged that it would not be feasible for the General Assembly to tailor the grant amounts on a district-by-district basis and still encourage candidates to participate in the program. Adhering to the actual legal standard from *Buckley*, rather than petitioners' unsupported speculations, the court therefore again concluded that there simply was no evidence that the higher grant amounts have operated to reduce the strength of minor parties below that attained before the CEP was enacted. Pet. App. 141a-142a. The Court of Appeals appropriately accorded deference to legislative judgments, particularly where petitioners were unable to make out any record of harm.

Third Principle: A Plaintiff Bears The Burden Of Establishing That The Program Operates To Reduce Its Strength To A Level Below That Attained Without The Program.

The Court of Appeals concluded that there is insufficient evidence in the record to conclude that the CEP's eligibility criteria or distribution formulae reduced the strength of minor-party candidates below that attained without any public financing. Pet. App. 129a, 131a, 141a; *Buckley*, 424 U.S. at 99. Petitioners adduced no evidence that demonstrated that either their strength or that of any minor party or unaffiliated candidate had been reduced to a level below that attained prior to the enactment of the CEP. In fact, the early indications from just one

election cycle were that the CEP benefited many minor party candidates and could potentially be a "boon" for minor party and unaffiliated candidates in Connecticut. Pet. App. 135a.

Moreover, petitioners do not claim that the CEP limits their *own* ability to participate in the political process, associate with voters, engage in political speech, access the ballot, spread their political message or receive contributions from supporters. Instead, petitioners' claim of harm is that another group of candidates are provided benefits denied them.[6] This derivative claim of harm is not a burden on the right of political opportunity under any of this

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[6] Paradoxically, petitioners emphasize throughout their petition, (Pet. 7, 16, 28), the one provision of the CEP that operates to give major party candidates *less* of a benefit than they would otherwise be entitled to under the CEP. Petitioners contend that the operation of Conn. Gen. Stat. § 9-705(j)(4), which gives major party candidates a lower grant and therefore a less generous benefit, *harms* them. This position is perplexing in light of the fact that the smaller grant amounts for major party candidates provided for under this provision will often apply in the "safe" districts petitioners argue they frequently run in. Moreover, the result of invalidating that provision as petitioners seek, would be that major party candidates would receive larger CEP grants at the outset of the election, since that provision is severable under Conn. Gen. Stat. § 9-717 and could be excised. Petitioners' claim that this provision "punishes" them for the exercise of their First Amendment rights, (Pet. 30), is specious. Indeed, they could just as easily argue that they are chilled from even seeking ballot access in a district in the first instance since their mere presence on the ballot makes a participating candidate eligible for more funds. Conn. Gen. Stat. §§ 9-705(j)(3)-(4).

Court's precedents, and was rejected in *Buckley*. *Buckley,* 424 U.S. at 94-99 n. 128 (denial of enhanced political opportunity through public funding does not limit minor parties' ability to participate in the political process, and "the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions").

Fourth Principle: A Court Should Not Engage In Speculation And Should Require A Plaintiff To Adduce Tangible Evidence Of Practical Effects About The Operation Of The Program Before Considering The Program's Constitutionality.

The Court of Appeals found the petitioners had not satisfied their burden under *Buckley* to demonstrate "practical effects" of a reduction of their strength as a result of the operation of the CEP. Petitioners failed to demonstrate any "practical effects" of an unfair or unnecessary burden or reduction of their strength attributable to the CEP, not only because they had not demonstrated the CEP harmed them, but also because the evidence in the record pointed to a potential "boon," (Pet. App. 135a), to viable minor party candidates who could potentially qualify for CEP funding in significant numbers. The Court of Appeals observed that many of petitioners' *speculations* about how the CEP will operate to harm them in "uncompetitive" or "safe" districts were far from certain. In particular, it noted

that major parties were reluctant to field candidates in their opponent's "safe" districts even during the 2008 elections, debunking petitioners' claim that the 20% statewide qualification proxy "inevitably" would increase major party competition to their detriment.

The Court of Appeals also noted that there is no reason to believe that an increase in major party competition (i.e., two major party candidates competing within a district) necessarily would result in a decrease in minor party strength in that district because many minor parties are based on a core group of supporters who will not vote for another party. To the contrary, the court reasoned that the addition of another major party candidate could in fact *increase* minor party strength by forcing the existing major party candidate to move to the center, thereby causing voters on the extreme end of the ideological spectrum to vote for a minor party candidate instead. Moreover, the court stressed that the CEP's 20% statewide proxy could in fact provide a *windfall* to minor parties in the event that they are able to organize around a candidate for governor who can reach the 20% threshold, as such a showing would automatically guarantee a full grant to all of that party's candidates *for every office in the next election*. Such a result would be nothing short of transformative for a minor party. Pet. App. 134a.

In its discussion of each of petitioners' claims, the Court of Appeals emphasized the fact that the record in this case is limited to evidence of just one election cycle in which the CEP had a chance to operate.

Thus, although it acknowledged that a more complete picture of the CEP's impact may arise in another case and on another record, the court concluded that the evidence in this case simply does not support petitioners' claims. Although it is plausible that petitioners' speculations may prove to be accurate in the future, it is equally, if not more, plausible that the exact opposite will happen and minor parties (whether the petitioners or other minor parties) will in fact blossom and become far *stronger* under the CEP than they previously had been. It is precisely for this reason—the impossibility of predicting a public financing program's true impact on any one group's strength in one election cycle—that this Court has required petitioners to produce the evidence that the Court of Appeals found to be distinctly lacking in this case. *Buckley*, 424 U.S. at 97 n. 131, 98-99, 101.

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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